

Advisory
Council On
Historic
Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

Reply to: 730 Simms Street, #401
Golden, Colorado 80401

October 18, 1993

John E. Schaufelberger
Colonel, Corps of Engineers
Division Engineer
Missouri River Division
P.O. Box 103, Downtown Station
Omaha, NE 68101-0103

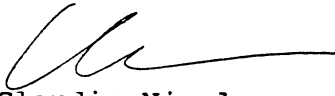
REF: Programmatic Agreement regarding the Effects of Operation and
Management of the Six Missouri River Mainstem Reservoirs as
Integrated Components of the Basin-Wide Comprehensive Missouri
Basin Plan

Dear Colonel Schaufelberger:

The enclosed Programmatic Agreement regarding the Six Missouri River Mainstem Reservoirs has been accepted by the Council. This action constitutes the comments of the Council required by Section 106 of the National Historic Preservation Act and the Council's regulations. Please send the original Agreement to each State Preservation Officer for signatures, then send copies of the signed Agreement to each of the four involved State Historic Preservation Officer and your Federal Preservation Officer, and return the signed original to the Council's Western Office in Golden, Colorado for our files.

The Council appreciates your cooperation in reaching a satisfactory resolution of this matter. We also appreciate the contributions of Mr. Gene Galloway of your staff in developing the Programmatic Agreement and coordinating the consultation effort.

Sincerely,


Claudia Nissley
Director, Western Office
of Review

Enclosure

PROGRAMMATIC AGREEMENT
AMONG
THE OMAHA DISTRICT AND MISSOURI RIVER DIVISION,
U.S. ARMY CORPS OF ENGINEERS,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
AND THE STATE HISTORIC PRESERVATION OFFICERS OF MONTANA,
NORTH DAKOTA, SOUTH DAKOTA AND NEBRASKA
REGARDING

THE EFFECTS OF OPERATION AND MANAGEMENT OF THE SIX MISSOURI RIVER
MAINSTEM RESERVOIRS AS INTEGRATED COMPONENTS OF THE BASIN-WIDE
COMPREHENSIVE MISSOURI BASIN PLAN

WHEREAS, the Omaha District and the Reservoir Control Center, Missouri River Division, U.S. Army Corps of Engineers, hereinafter referred to as "the Corps", operates and maintains the integrated system of multi-purpose reservoir projects on the mainstem of the Missouri River for flood control, navigation, irrigation, municipal and industrial use, recreation, fish and wildlife, and other purposes as authorized by the Flood Control Act of 1944 (P.L. 543, 78th Congress, as amended) and other relevant authorities; and

WHEREAS, authorized water control measures utilized in operating these reservoirs requires variability of impounded water surface elevations ranging from maximum pool elevations to original river surface elevations; and

WHEREAS, authorized operation and management of impounded waters results in inevitable and significant adverse effects to historic properties through inundation, erosion, exposure and other impacts; and

WHEREAS, authorized management of project lands which are not routinely inundated includes land based support facilities for water control management and measures undertaken for the benefit of recreation and general public use, lease actions, improvement or stewardship of fish and wildlife habitat and natural resources, and other earth-disturbing activities which have the potential to affect known historic properties and properties unknown but eligible for inclusion in the National Register of Historic Places; and

WHEREAS, the Corps is authorized and directed by the National Historic Preservation Act of 1966 (P.L. 89-665, as amended) and other legislation to preserve and protect historic properties on Federal lands or affected by Federal undertakings; and

WHEREAS, the Corps has determined that operation and integrated management of water levels in the reservoirs of the Missouri mainstem system (consisting of Fort Peck Lake, Lake Sakakawea,

Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake) constitutes a Federal undertaking for purposes of Section 106 of the National Historic Preservation Act; and

WHEREAS, the Corps has determined that individual management actions proposed on project lands which are above the top of the wave-cut escarpment constitute separate and individual undertakings for purposes of Section 106 of the National Historic Preservation Act; and

WHEREAS, the Corps has consulted with the Advisory Council on Historic Preservation (Council) and the Montana, North Dakota, South Dakota, and Nebraska State Historic Preservation Officers (SHPOs) pursuant to 36 CFR 800.13 of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f);

NOW, THEREFORE, the Corps, the Council, and the SHPOs of Montana, North Dakota, South Dakota, and Nebraska agree that the Missouri River mainstem reservoirs shall be administered in accordance with the following stipulations to satisfy the Corps' Section 106 responsibilities for all aspects of the management of the named reservoir waters and reservoir lands.

STIPULATIONS

The Corps shall ensure that the following measures are carried out:

I. General

A. Management of impounded waters within the reservoirs constitutes a single Federal undertaking known to have effects on all historic properties within the reservoir pool. Evaluation of effects and determination of appropriate treatment will be addressed in consultation with the SHPO pursuant to site remedial action plans or the pertinent Historic Properties Management Plan, and/or on a case by case basis in accordance with 36 CFR Part 800.

B. The Corps will identify interested persons and pertinent Indian tribes and afford them an opportunity to review, comment on, or object to proposed undertakings, inventory strategies, eligibility determinations and effect findings, and to participate in developing treatment plans. The Corps will ensure that interested persons are identified as early in the proposed project planning process as possible, and are informed of their

option to object to the Council regarding the Corps' consideration of or taking of treatment action(s) for an undertaking.

C. For situations in which a proposed undertaking is considered in a document generated under the requirements of the National Environmental Policy Act (NEPA), public participation for purposes of this agreement may be included in the public participation process for the NEPA document. In such instances, the Corps will ensure that the NEPA process is tailored to satisfy public participation requirements set forth at 36 CFR Part 800.

II. The Missouri River Master Water Control Manual Review and Update of 1991-1993.

The Master Water Control Manual Review and Update addresses possible modification of mainstem system water management and reservoir regulation. It is agreed that the management alternatives studied may include options which could result in significant variations from existing average annual effects on historic properties, and that these potential variations in effect will be taken into account as follows:

A. The Corps, in consultation with the Advisory Council and affected SHPOs, will study and evaluate existing data and incidental new information, including a sample survey at Fort Peck Lake, to determine probable variations of effect on historic properties among the alternatives investigated. The identified effects will be weighed among the criteria developed for selecting a preferred alternative, and presented in NEPA documentation and coordination.

B. A reservoir regulation alternative plan could be selected which was identified during the planning and consultation process as likely to have new or accelerated average annual effects on historic properties. In that event, the Corps and the consulting parties will determine necessary measures to assure completion of the Section 106 process, including possible separate and specific Memoranda of Agreement.

III. Sites Undergoing Damage: Remedial Action

Remedial action shall be identified and prioritized in the following manner at significant sites sustaining ongoing damage from project operation, or sites in imminent danger of such damage:

A. The Corps, in consultation with the SHPO and other relevant entities, shall prepare a brief Remedial Action Plan (RAP) for each endangered site which the Corps and SHPO mutually

agree to be eligible for nomination to the National Register of Historic Places (NRHP). No RAP should exceed 2-4 narrative pages plus minimal maps, charts, or illustrations. Consistent with the sites' adjudged level of national, regional, or local significance, the SHPO will recommend an order of preservation priority pursuant to the State Historic Preservation Plan. Priorities will be flexible.

B. Each RAP will summarily establish:

1. The nature and importance of the scientific information in the site, according to the best available current information, and taking into account the regional historic context as defined in the Secretary of Interior's Standards and Guidelines on Archeology and Historic Preservation,
2. The apparent potential of the site for development for public use, interpretation, and education,
3. The current state priority ranking established by the SHPO,
4. A description of the ongoing or imminent damage,
5. A minimum of three alternative plans, with estimated costs, which would reduce or mitigate the adverse effect of the Federal undertaking, including a selected plan and a low-cost option or interim measure.

C. Remedial Action Plans expedite response to immediate resource damage problems. They do not replace any part of the Historic Properties Management Plans.

D. Remedial action shall be undertaken at the earliest opportunity and in the most expeditious manner feasible, consistent with the priority established by the RAP. Completion of remedial measures prescribed in the RAP will constitute, to the extent defined in the RAP, mitigation of identified adverse effects of project operations in compliance with 36 CFR 800.

E. A copy of each RAP will be furnished by the Corps to the Advisory Council on Historic Preservation (ACHP) for information and possible comment within 15 working days from receipt of the draft agreed upon by the Corps and SHPO. An active commenting and advisory role by the ACHP is anticipated in formulating at least the first few RAPs under this PMOA.

IV. Historic Properties Management Plans

A. The Corps will ensure the earliest possible development of a Historic Properties Management Plan (HPMP) for each main-stem reservoir area. Preparation of the HPMPs will be scheduled

at a rate of not less than two per year and completion of the six HPMPs will be completed at the earliest practicable date. The Corps will ensure that development of the HPMPs will proceed in consultation with the appropriate SHPOs and interested persons.

B. Fort Peck Lake Inventory - Historic properties inventory at Fort Peck Lake is still limited to less than 10% of project lands. The Corps will, therefore, prioritize funding to conduct intensive survey on at least one-third (33%) of remaining unsurveyed project lands at the earliest possible time and prior to completion of the Fort Peck HPMP. The Corps will design the inventory strategy in collaboration with the SHPO. The completed draft survey report, site forms, and determinations of eligibility will be provided to the SHPO for review and comment within 45 days of receipt from the Corps.

C. In addition to meeting the terms of this programmatic agreement, the HPMPs will accommodate the requirements of Engineer Regulation 1130-2-438.

D. Drafts of HPMPs shall be prepared by the Corps Omaha District and submitted to the Corps Division, the appropriate SHPOs, and the Council for review and comment. After concurrence of the SHPO, Council, and the Corps, the HPMP will be finalized and implemented by the Corps in lieu of compliance with 36 CFR 800.4 through 800.6 and 800.11.

E. HPMPs shall include, but not be limited to the following:

1. Foreword. The Foreword shall explain the basis upon which the HPMP is prepared.

2. Introduction. The Introduction shall explain the organization and use of the various sections of the HPMP.

3. Overview. The Overview of each HPMP will synthesize available data on the history, prehistory, architecture, architectural history, landscape architecture, and ethnography of the reservoir study area and its surrounding area, including state comprehensive plans for historic preservation, to provide a context in which to evaluate and consider alternative treatment strategies for different classes of historic properties.

4. Inventory. The Inventory will include descriptions of all properties within the reservoir area, including the multi-purpose pool of the reservoir. All known sites should be tabulated and classified as to whether NRHP listed, determined eligible for nomination, eligible by consensus, not eligible, or unknown.

a. Listing may consist of a computerized inventory record, or be suitable for conversion to computerized inventory with the potential for retrieval and sorting by several criteria, including site location, cultural affiliation, site number and an endangerment index. References to source material should be included. The inventory may be appended after the main body of text.

b. Maps showing site locations and surveyed and unsurveyed portions of project lands will be prepared as a separate portfolio. Site locations are not to be released to the public. Overall maps should be minimally suitable for comprehensive reservoir project overview. Larger scale maps should be suitable for baseline documentation of specific undertakings.

c. Predictions based on the analysis of the overview, will be developed to account for the distribution and nature of historic properties within each reservoir area. An estimate of the accuracy of the predictions will be offered, and means by which predictions will be tested, refined, and verified to the extent needed through field survey and further research will be identified. Surveys needed for completion of the requirements of Section 110(A)(2) of the National Historic Preservation Act, as amended, will be prioritized and scheduled.

5. Management System. The management system of the HPMP will establish mechanisms and procedures for the management of historic properties within the reservoir project area, including, but not limited to:

a. Procedures for identification of dynamic effects on historic properties impacted by reservoir water management.

b. Procedures for determining appropriate mitigation measures.

c. The identification system will take into account the Section 110 Guidelines, Section 110(a)(2), Discussion (b)(2) through (b)(10) as applicable, and will provide for identification and evaluation to take place in a timely manner during planning of any actions that might affect historic properties, including historic landscapes and traditional cultural properties.

d. Procedures for identification of potential effects on historic properties incurred through proposed management actions other than reservoir water management, including construction, agriculture, horticulture or other earth-disturbing activity on project lands, and determination of most appropriate mitigative measures or other action.

e. A listing of common management actions or administrative conditions which are agreed to result in "no effect" to historic properties under given conditions and which are, therefore, exempt from further coordination procedures except as may be specified.

f. Procedures for the use of historic properties for agency purposes or the purposes of others in a manner that does not cause significant damage to or deterioration of such properties, with reference to Section 111 of the National Historic Preservation Act, the Section 110 Guidelines, Section 110(a)(1), Discussion (b), and specifically providing for the Secretary of Interior's Standards and Guidelines for Preservation Projects.

g. Procedures for affirmatively preserving historic properties with reference to the Section 110 Guidelines, Section 110(a)(1), and Discussion (c), and specifically providing for the Secretary's Standards for Documentation.

h. Procedures for the maintenance of historic properties with reference to the Section 110 Guidelines, Section 110(a)(2), Discussion (d)(1)(i), and specifically providing for the Secretary of Interior's Standards and Guidelines for Preservation Projects.

i. Procedures for the avoidance or mitigation of adverse effects on historic properties with reference to the Section 110 Guidelines, Section 110(a)(2), Discussion (d)(1)(iii), and the Council's Treatment of Archeological Properties: a Handbook.

j. Procedures of consultation with relevant parties during implementation of the HPMP, with reference to the Section 110 Guidelines, Part III.

k. Procedures for the management and disposition of human remains and associated material. These procedures will comply with State law to the extent that state law does not conflict with Federal law or with Federal agreements with Indian tribes.

l. Procedures for consultation with the ACHP, SHPO, and appropriate Indian tribes regarding properties discovered during implementation of an undertaking.

V. Consultation Review and Response

Except as otherwise provided, the Corps shall provide 30 calendar days from receipt by the appropriate SHPO and Council to

respond to any Corps communications or HPMPs required under the terms of this agreement. Should appropriate SHPO or Council not respond within this time limit, the Corps may presume SHPO or Council concurrence. The Corps shall document non-response by the SHPO or Council in the appropriate case file.

VI. Interim Procedure Pending Completion of HPMPs

A. Pending completion of any HPMP and its acceptance by the appropriate SHPO and the Council, as consistent with this agreement, the Corps shall consult in accordance with 36 CFR 800, for any undertaking that may affect historic properties within reservoir project areas which would otherwise be covered under the terms of this agreement.

B. The Corps, with the concurrence of the appropriate SHPO(s), may define classes of undertakings that have no possible effect on historic properties, or classes of historic properties which would not qualify for listing on the National Register. In implementing such an undertaking, the Corps does not need to enter into project specific consultation with the SHPO and may proceed with the undertaking. However, such actions would be reported by the Corps on an annual basis pursuant to Stipulation VIII of this agreement.

VII. Dispute Resolution

A. Should a dispute or objection arise regarding any aspect of an HPMP, RAP, or an undertaking subject to review under this agreement, the Corps will consult with the disputing or objecting party, the appropriate SHPO, and other interested persons, if any, to resolve the objection.

1. If the Corps determines that initial objection by the SHPO, Council or other interested person cannot be resolved, the SHPO, Council, or Corps may request a meeting to investigate the circumstances of the dispute or objection. The meeting will involve, at minimum, the disputant, the SHPO and the appropriate Corps agency official. The Corps shall notify the Council of any such meeting upon determination that such meeting will be held.

2. If such consultation fails to resolve the objection or dispute, Corps shall submit all relevant documentation pertaining to the dispute or objection with the Corps proposal for its resolution to the Council. Within 30 calendar days of receipt of all pertinent documentation, the Council shall either:

a. notify the Corps that it will consider the dispute pursuant to the applicable provisions of 36 CFR 800.6(b) and proceed to comment; or

b. provide the Corps with recommendations, which the Corps will take into account in reaching a final decision.

B. Failure of the Council to respond formally or informally within 30 calendar days shall be taken as evidence of the Council's concurrence in the Corps proposal for resolution of the dispute or objection.

VIII. Agreement Review

A. The parties to this agreement shall review its terms one year from the date of execution to determine whether its continuation, amendment, or termination is appropriate. Review of the agreement shall be based, in part, on a report prepared by the Corps and submitted to the SHPOs and Council not less than 30 days prior to the date of review. At a minimum, the report shall include:

1. A listing of all undertakings;
2. A listing of all survey and identification activities;
3. A listing of all undertakings exempted from review pursuant to Stipulation VI,B;
4. A listing of all historic properties affected by Corps undertakings during the reporting period;
5. A listing of the measures the Corps implemented to avoid, minimize or mitigate effects to historic properties;
6. A summary of Corps progress toward the completion of any HPMPs;
7. Corps assessment of how well the programmatic agreement is working;
8. Any other facts the Corps considers pertinent to evaluation of the activities covered by the programmatic agreement and any reasonably available information that the SHPOs or the Council may have requested that the Corps incorporate into the report; and
9. A listing of all RAPs prepared under Stipulation III of this agreement.

B. If continued or amended, subsequent review periods will be determined. Interim review may occur based on the exercise of the dispute clause or determination by the Corps, appropriate SHPO(s), or Council of unsatisfactory performance.

IX. Amendments

Any party to this agreement may request that it be amended whereupon the parties will consult in accordance with 36 CFR 800.13 to consider such amendment.

X. Funding Availability

Nothing herein shall be construed as obligating the Corps or the SHPO to expend funds or as involving the United States or the State in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administratively allocated for this work.

XI. Termination

A. Any party to this agreement may withdraw from it by providing the other parties ninety (90) days written notice, explaining the reasons for withdrawal. During the 90 days preceding withdrawal, the parties will consult to identify and implement any mutually acceptable measures that would avoid the party's withdrawal.

B. Termination of this agreement may be effected by the Corps upon notifying all parties that it can no longer fulfill the agreement provisions, or by a majority of the affected States upon their joint or individual notice to the other parties.

C. Termination of this agreement, or the Corps' failure to satisfy its terms shall require the Corps to comply with 36 CFR 800 with respect to all undertakings that would otherwise be reviewed under this agreement.

Execution and implementation of this Programmatic Agreement evidences that the Corps has afforded the Council a reasonable opportunity to comment on the effects on historic properties of its administration of the Missouri River Main Stem Reservoir projects.

Corps of Engineers, Omaha District

BY William H. Neulander Date September 14, 1993
Title Colonel, Corps of Engineers
Commanding

Corps of Engineers, Missouri River Division

BY John E. Schaferberg Date SEPTEMBER 10, 1993
Title Colonel, Corps of Engineers
Commander, Missouri River Division

Advisory Council on Historic Preservation

BY Robert D. Bush Date 10/12/93
Title Executive Director

Montana State Historic Preservation Officer

BY Marvella Sheff Date 12-10-93
Title _____

Nebraska State Historic Preservation Officer

BY Bob Paschendorf Date 7/18/94
Title DSHPO

North Dakota State Historic Preservation Officer

BY James E. Shum Date 1/31/94
Title _____

South Dakota State Historic Preservation Officer

BY [Signature] Date 2/10/94
Title _____